

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

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United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

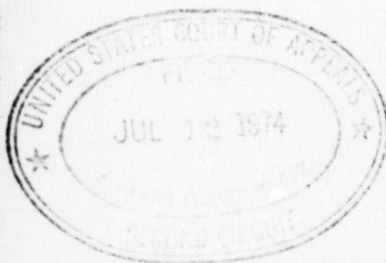
-against-

OSMUNDO RODRIGUEZ,

Defendant-Appellant.

*On Appeal From The United States District Court
For The Eastern District Of New York*

APPENDIX FOR APPELLANT



RICHARD I. ROSENKRANZ
Attorney for Defendant-Appellant
66 Court Street
Brooklyn, N.Y. 11201
TR 5-9440-1

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Docket Entries

UNITED STATES DISTRICT COURT

UNITED STATES OF AMERICA

vs.

No. 72 CR 972

JOHN WILLIAM OSBOURNE and
OSMUNDO RODRIGUEZ

Date	Proceedings
8-17-72	Before DOOLING, J. - Indictment filed.
8-25-72	Mag. File 72 M 1501 inserted into CR File.
9-8-72	Before RAYFIEL, J - Case called - Deft Rodriguez & counsel H. Handman present - deft Osbourne not present - deft RODRIGUEZ arraigned & enters a plea of not guilty - Govt moves for Bench Warrant as to deft Osbourne - Motion granted.
9-20-72	Notice of Motion filed, ret. Sept. 29, 1972, for Inspection, Bill of Particulars, suppressing evidence, etc. (deft RODRIGUEZ)
1-12-73	Govt Bill of Particulars filed.
2-22-73	Before RAYFIEL, J - Case called - Counsel Herbert Handman present - Discovery Motion argued - granted and denied as indicated (see calendar entry (deft Rodriguez)).
3-6-73	Bill of Particulars filed.
8-23-73	Before RAYFIEL, J - Case called - Deft Osbourne arraigned and pleads not guilty - Increase in bail from \$5,00 to \$10,000 bond, 10% in cash.
9-12-73	Before RAYFIEL, J - Case called - Deft OSBOURNE & counsel G. La Berteau present - deft after being

Docket Entries

Date	Proceedings
	advised of his rights by the court and on his own behalf withdraws his plea of not guilty and enters a plea of guilty to count (3) sentence adjd without date - bail set at \$5,000 personal recognizance bond.
9-17-73	Stenographers transcript dated 9-12-73 filed, OSBOURNE.
12-12-73	Before NEAHER, J - Case called - set down for trial on Jan. 28, 1974 for status report.
1-21-74	Letter of Jan. 16, 1974 filed from Herbert I. Handman, Esq. counsel for deft Rodriguez adjourning matter now in the calendar Jan. 28, 1974 until Feb. 11, 1974 as a tentative trial date.
2-11-74	Before NEAHER, J - case called - adjd to Feb. 19, 1974 for trial.
2-15-74	Before NEAHER, J - case called - adjd to 2-22-74 at 11:30 am.
2-19-74	Before NEAHER, J - Case called - Motion to suppress - Deft and counsel pres. Interpreter Maria Elena Cardneas sworn - Motion argued and decision resv. Trial ordered and begun - Jurors selected and sworn - Trial contd to 2-20-74 (OSMUNDO RODRIGUEZ).
2-20-74	Before NEAHER, J - case called - trial resumed - Trial contd to 2-21-74.
2-21-74	Before NEAHER, J - case called - trial resumed - defts motion to dismiss - denied - Trial held and contd to 2-25-74.
2-25-74	Before NEAHER, J - case called - trial resumed - defts motion for a mistrial is denied - Marshals sworn - alternates discharged - Jury retires to deliberate at 3:30 PM. Jury returns at 7:15 PM with verdict of guilty on each of counts 1,2&c - sentence adjd without date - Trial concluded - Bail continued.
2-26-74	3 stenographers transcripts filed (dated Feb. 19, Feb. 20 and Feb 21, 1974 consecutively) Rodriguez.

Docket Entries

Date	Proceedings
3-15-74	Before NEAHER, J - Case called - Deft OSBORNE and counsel present - Adjd to 4/26-74 at 11:30 A.M.
3-22-74	Stenographer's transcript of 2/25/74 filed.
3-26-74	Before NEAHER, J - case called - deft & counsel H. Handnan present - adjd to May 24, 1974 (for sentence) (OSMUNDO RODRIGUEZ).
5-24-74	Before NEAHER, J - case called - deft Rodriguez & H. Handman, counsel present - deft sentenced to imprisonment for 2 years on each of counts 1, and 3 - pursuant to 18:4208(a)(2) - sentence to run concurrently also special parole term of 5 years - execution of sentence is stayed pending appeal to be perfected within 30 days.
5-24-74	Judgment & Commitment filed - certified copies to Marshal (Rodriguez).
5-29-74	Notice of appeal filed (RODRIGUEZ).
5-29-74	Docket entries and duplicate of notice of appeal mailed to court of appeals (RODRIGUEZ).
6-10-74	Order received from the Court of Appeals that the record be docketed on or before June 18, 1974 (Rodriguez).
6-17-74	Record on appeal certified and handed to Sandy Sadowitz for delivery to the court of appeals (Rodriguez).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

-against-

JOHN WILLIAM OSBOURNE and
OSMUNDO RODRIGUEZ,

Defendants.
-----X

Cr. No. _____
(21 U.S.C. Sec.841(a)
Sec.846; 18 USC,
Sec.2)

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 23rd day of June 1972, within the Eastern District of New York the defendant JOHN WILLIAM OSBOURNE and the defendant OSMUNDO RODRIGUEZ did knowingly and intentionally distribute approximately 6 grams of cocaine, a Schedule II narcotic drug controlled substance in violation of Title 21, United States Code, Sec. 841(a), United States Code, Sec. 2.

COUNT TWO

On or about the 27th day of June 1972, within the Eastern District of New York the defendant JOHN WILLIAM OSBOURNE and the defendant OSMUNDO RODRIGUEZ did knowingly and intentionally distribute approximately 60 grams of cocaine, a Schedule II narcotic drug controlled substance in violation of Title 21, United States Code, Sec. 841(a) and Title 18, United States Code, Sec. 2.

COUNT THREE

On or about and between the 20th day of June 1972 and the 28th day of June 1972, both days being approximate and inclusive, within the Eastern District of New York, the defendant JOHN WILLIAM OSBOURNE and the defendant OSMUNDO RODRIGUEZ did knowingly and wilfully conspire to commit an offense against the United States, in violation of Title 21, United States Code, Sec. 841(a) by conspiring to distribute a quantity of cocaine, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Sec. 846.)

In furtherance of said unlawful conspiracy and to effect the objectives thereof, the defendant JOHN WILLIAM OSBOURNE and the defendant OSMUNDO RODRIGUEZ committed the following

O V E R T A C T S

1. On or about the 23rd day of June 1972, JOHN WILLIAM OSBOURNE gave approximately 6 grams of cocaine to an agent of the Bureau of Narcotics and Dangerous Drugs.

A TRUE BILL

s/ Raymond J. Michaux
Deputy Foreman

s/ Robert A. Morse by T.J.S.
UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,

-against-

72 Cr. 972

JOHN WILLIAM OSBOURNE and
OSMUNDO RODRIGUEZ,

Defendants.

-----X

United States Courthouse
225 Cadman Plaza
Brooklyn, New York

February 20, 1974
10:00 A.M.

BEFORE: HON. EDWARD R. NEAHER,
United States District Judge

APPEARANCES:

EDWARD J. BOYD, Esq.
Acting U.S. Attorney

BY: JAMES PASCARELLA, Esq.
Assistant U.S. Attorney

HERBERT HANDMAN, Esq.
Attorney for Defendant
Osmundo Rodriguez

Michael J. Miele
Official Court Reporter

3a

**PRE-TRIAL HEARING TO SUPPRESS INCRIMINATING STATEMENTS
FOR FAILURE OF GOVERNMENT TO COMPLY WITH COURT ORDER
GRANTING APPELLANT PARTICULARS.**

6a

1 MR. HANDMAN: If your Honor please, what I would
2 like to bring before the Court now is not exactly a
3 suppression type motion but rather an instance in my
4 opinion is the failure of the Government to comply with
5 the prior mandates of this Court in respect to furnish-
6 ing of particulars. In effect I believe we have just
7 been advised by the United States Attorney this morning
8 of a new statement or alleged statement of the defendant.

9 When this matter was gone into at great length
10 on several occasions before Judge Rayfiel who had the
11 case prior to your Honor, I was advised specifically
12 that there were no specific statements.

13 Just for the record, and for your Honor's infor-
14 mation, I would very quickly review that history. The
15 defendant made a demand for a bill of particulars and
16 this was way back in September of 1972, and we asked
17 in question 1a, requiring the Government to produce for
18 the defendant's inspection, copying, recording, any
19 and all purported confessions, admissions or statements
20 allegedly made by the defendants to officers or agents
21 of the Government or persons acting in their behalf or
22 at their suggestions and, b, whether such are reduced
23 to writing or recorded by any means or not, so long
24 as the same are in possession and control of the
25 Government. Subsequent to that the Government furnished

1 a bill of particulars in which the defendant was fur-
2 nished with one handwritten set of notes, and that in
3 the particulars it says, "Notes by Assistant U. S.
4 Attorney Francis J. Sherrin on Defendant's statement to
5 him."

6 Now, I am quoting from Government's sworn bill
7 dated January 10, 1973. Subsequently a motion was
8 made before Judge Rayfiel at which other aspects of
9 the bill of particulars were argued and orally before
10 that Court that very same Assistant U. S. Attorney said
11 that that was all, those were his words, that is all
12 that he had in respect to confessions, admissions or
13 statements made by the defendant to him, to any officer
14 whether oral or in writing and that is all that I got.

15 Then when Mr. Pascarella took over the case I
16 wrote him a letter in which -- dated December 17, 1973 --
17 in which I said, if you represent that the particulars
18 already served answer in full those items heretofore
19 responded to, i.e., the response given in Government's
20 particulars dated January 10, 1973, I will then have
21 no further requests at this time.

22 Now, Mr. Pascarella then advised me that he had
23 no further particulars or he represented that that was
24 answered in full.

25 This morning I was handed a typewritten sheet

1 purporting to be another summary of statements of this
2 defendant, Mr. Rodriguez. At this point apparently it
3 was made to an agent. I point out to the Court that
4 the bill of particulars says that these statements
5 were made to Mr. Sherrin and Mr. Sherrin's notes do
6 not indicate that there was any agent in the room with
7 him and as a matter of fact his notes start off with --
8 I have a Xerox of it.

9 That is what I am talking about, and it starts
10 off 1:20 p.m. defendant arrives. I did all the talking.
11 Sent defendant out of the room.

12 MR. PASCARELLA: I don't think it is necessary to
13 read that all, your Honor. You have a copy before you.

14 MR. HANDMAN: My only point is I don't believe
15 at this point on the eve of trial much postponed after
16 many months after arguments, motions, representations
17 by two U. S. Attorneys, anybody other than Mr. Sherrin
18 ought to be able to testify to any statements of this
19 defendant.

20 MR. PASCARELLA: So that the record is entirely
21 clear, as to postponements, most that I recall, and as
22 recently as last week were at the request of the
23 defendant.

24 Secondly, defense counsel, and I explained to
25 him this morning, these are not new statements of the

1 defendant. There is no surprise nor can he claim sur-
2 prise.

3 What happened is this: At a meeting which
4 involved a particular agent, Edward Coughlin, Assistant
5 U. S. Attorney Sherrin, the defendant, and the agent,
6 the defendant made certain statements and apparently
7 Mr. Sherrin did all the talking as his handwritten
8 statement suggests. That doesn't prevent Mr. Coughlin,
9 the agent, from listening to the conversation. I
10 explained to Mr. Handman, he does not believe that
11 Mr. Sherrin spoke to the defendant himself and there was
12 an agent present --

13 THE COURT: I think the notes indicate there
14 was an agent present.

15 MR. PASCARELLA: If I may complete my statement,
16 the statement I handed him is just Mr. Coughlin's
17 report, a written report which apparently Mr. Sherrin
18 did not have at that time, of the same exact statements
19 made by the defendant. I would submit to your Honor
20 a copy of this report which I ask be marked Court
21 Exhibit and 3500 material later so that the Court may
22 compare what is stated in the agent's report and what
23 was stated by Mr. Sherrin as having been spoken by the
24 defendant when he interviewed him.

25 I think it is unfair to claim the Government comes

1 in with statements at the eve of trial when in fact it
2 is the same statement.

3 Another report of those statements but the same
4 statements --

5 MR. HANDMAN: It indicates specifically that the
6 defendant was sent out of the room and the United States
7 Attorney spoke with an agent and I don't gather from
8 this that this means there was anybody present. I
9 was never informed by Mr. Sherrin when I spoke to him
10 that there was anybody present, but the other point is
11 this, I am not relating this as to delays. There were
12 adjournments by both the Government and myself. That
13 is not pertinent. There are differences, small dif-
14 ferences, but in this case where I now find the
15 Government apparently is almost wholly relying on this
16 particular conversation and alleged admission, and
17 this is the whole case, sir --

18 MR. PASCARELLA: Counsel, I don't know what the
19 basis for his statement is in saying that but I wanted
20 to make that clear, that is not the case.

21 MR. HANDMAN: I feel we were advised of a
22 conversation with Mr. Sherrin, done by Mr. Sherrin
23 before Judge Rayfiel verbatim and when he said this is
24 all I have and it is in this court record, which I do
25 not have but I can get, I do not feel they should come

1 in now with another report which is only dated over a
2 year after this alleged conversation and hand in some-
3 thing that was done apparently in preparation for trial
4 and alters and provides much more detail and much
5 information than what they had before.

6 I just feel any other conversation should be
7 precluded. If there is any such thing as a bill of
8 particulars fully argued, decided upon by Judge Rayfiel
9 and agreed to by the United States Attorney, Mr. Sherrin,
10 this is it. We had three sessions on the bill of
11 particulars.

12 MR. PASCARELLA: I do not see defense counsel's
13 point. He is talking about other statements and he is
14 missing the point.

15 The statement which is the report of Agent
16 Coughlin handed to defense counsel is dated less than
17 three months after the conversation which is indicated
18 by Mr. Sherrin's notes.

19 Certainly counsel cannot be putting this propo-
20 sition that we must tell him everyone present when a
21 defendant makes a statement.

22 These are the same statements made during the
23 same conversation save for the fact Mr. Coughlin was
24 there as well as Mr. Sherrin and Mr. Coughlin represented
25 that fact in the form of a report. I gave that report

1 in advance to Mr. Handman. I got it late, also.

2 I indicated the statements were the same and
3 presented them to him to compare. Agent Coughlin will
4 testify on the stand as to statements and he will be
5 guided on what he heard and nothing beyond the statement
6 of Mr. Sherrin.

7 MR. HANDMAN: If in fact this was made three
8 months after the conversation, then it was made before the
9 demand for the bill of particulars, and then the state-
10 ment in the court record by Mr. Sherrin to me that you
11 are now -- well, that you have now received all copies of
12 any version of any statements of the defendant was then
13 not accurate. I have relied on that.

14 MR. PASCARELLA: The question of reliance there
15 must be something substantial.

16 I received this report late from the agent also.
17 When I was looking at this, at their copies in the file,
18 I found I did not have his report.

19 I was under the impression Mr. Coughlin was
20 present with Mr. Sherrin.

21 The fact that wasn't divulged is of no moment.
22 Is there surprise?

23 Here are my notes of what he said. Now he is
24 given the agent's report as to what he said. Is that
25 surprise? I cannot see that. Does that mean the

1 defendant doesn't prepare a proper defense? I submit
2 to the Court a Xerox copy of the agent's report and
3 ask you to compare them with the handwritten notes of
4 Mr. Sherrin provided to defense counsel over a year
5 ago.

6 THE COURT: Did you want one of those marked as
7 a Court exhibit?

8 MR. PASCARELLA: Yes. Perhaps we should have
9 it marked.

10 THE CLERK: One report marked as Government's
11 Exhibit 1.

12 THE COURT: Are we agreed that what you referred
13 to as Mr. Sherrin's notes, there is in the title a
14 letter, a bill of particulars stamp January 11th of
15 1973 and the original is in the file stamped January 11,
16 '73? I guess it is dated January 10, '73.

17 MR. HANDMAN: Yes.

18 THE COURT: There is a Xerox copy headed at the
19 top July 24, 1972.

20 MR. HANDMAN: Yes.

21 THE COURT: This is Mr. Sherrin's copy, a copy
22 thereof of his notes of an interview with the defendant.

23 MR. HANDMAN: In one of the bill of particulars
24 it says enclosed you will find notes by Assistant U. S.
25 Attorney Francis J. Sherrin on defendant's statement

1 to him and that was what was enclosed.

2 THE COURT: This report was dated December 7,
3 of '72; is that right?

4 The one marked Court Exhibit 1? Is that date
5 in the box December 7th of '72?

6 MR. PASCARELLA: Let me ask Mr. Coughlin, who
7 is here. The date it was written was December 7th.

8 THE COURT: Now there is a date in the lower
9 left-hand corner, 10/2/72; what does that mean?

10 MR. PASCARELLA: That is the date the group
11 supervisor finally signed the report.

12 It is less than two months after
13 the conversation which was July 24th of '72.

14 THE COURT: Would it have normally qualified,
15 however, as a statement producible under Rule 16?

16 MR. PASCARELLA: Yes. It is a statement and
17 the Government's position is that the statement was
18 produced. There is no disagreement there.

19 This is a statement that should have been pro-
20 duced and was produced.

21 THE COURT: Rule 16 says upon motion, which, I
22 take it, was made here, the Court may order Government
23 to permit the defendant to inspect and copy or photo-
24 graph any written or recorded statements or confessions
25 made by the defendant, copies thereof within the

1 custody or control of the Government, the existence of
2 which is known, or by the exercise of due diligence
3 may become known to the attorney for the Government.

4 The real issue I suppose here is whether the
5 existence of this report was known by Mr. Sherrin who
6 I take it was in charge of the case.

7 MR. PASCARELLA: May I respectfully indicate
8 the Government doesn't feel that that is the issue.

9 Mr. Sherrin made a contemporaneous notation on
10 July 24th and that was handed over. If just a listing
11 of the statements were turned over and in no official
12 report form --

13 THE COURT: That may be, but nevertheless Rule
14 16 does not say one statement. It says any relevant
15 written or recorded statements or confessions made by
16 the defendant or copies thereof within possession,
17 custody or control of the Government.

18 In my judgment this would clearly qualify as
19 a written or recorded statement of the defendant within
20 the possession of the Government.

21 MR. PASCARELLA: What we come down to is this --

22 THE COURT: Just a moment. There is no question
23 this would qualify.

24 As I see it the question is whether it was known
25 to the attorney of the Government at the time or by

1 the exercise of due diligence may become known.

2 To me that is what the issue really is. This
3 document, the first bill of particulars was prepared
4 January 10, 1973. This is four or five months after
5 this report existed.

6 You tell me you found a copy in the file?

7 MR. PASCARELLA: No. I found it in the Agent's
8 file not the Government's file.

9 The Government indicates to the Court it does
10 not feel the issue is which you have presented. The
11 question comes down to will statements allegedly made
12 by the defendant be admissible. If we don't use this
13 sheet at all we still have the first sheet which has
14 the same exact statements made by the defendant.

15 THE COURT: I understand that. What you are
16 saying is that there is a qualification on Rule 16 that
17 if a statement or a copy of any recorded statement was
18 furnished to the defendant the defendant doesn't have
19 to furnish other copies made by other persons.

20 MR. PASCARELLA: As long as they are the same
21 statements.

22 THE COURT: Are you saying that this statement
23 simply covers the same elements referred to in
24 Mr. Sherrin's notes?

25 MR. PASCARELLA: Yes.

1 The Government can go on the first statement.

2 THE COURT: What prejudice would arise for
3 example if this were used as compared to Mr. Sherrin's
4 own notes which you concedingly did get?

5 MR. HANDMAN: It then permits this agent,
6 Mr. Coughlin, to testify because according to his notes
7 he was present and whereas according to Mr. Sherrin's
8 notes, I had no advice that he was present.

9 THE COURT: I am not sure about that because the
10 phrase, "Sent the defendant out of room and spoke with
11 the agent," implies to me that the agent was present.

12 MR. PASCARELLA: What difference does that make.
13 There could have been 20 people present.

14 THE COURT: I am responding to Mr. Handman's
15 point.

16 MR. HANDMAN: There are differences. For
17 example Mr. Coughlin's statement, next to the last
18 statement, says Rodriguez was advised by United States
19 Attorney Sherrin that the Waterfront Commission would
20 be notified of his arrest and the license would be
21 checked and he would be suspended.

22 MR. PASCARELLA: That is not a statement by
23 Mr. Rodriguez but someone other than he.

24 MR. HANDMAN: In Mr. Sherrin's statement the only
25 reference to Mr. Rodriguez' question -- well, the only

1 reference to Rodriguez' job is exactly the opposite.
2 It says in the fourth sentence there, "told work pass
3 going to be given back no matter what he says." This
4 is a contrary position.

5 THE COURT: That is a statement that Sherrin made
6 to him, not what the defendant said.

7 MR. HANDMAN: If there are four statements or
8 four witnesses or four individuals each of them is
9 likely to recite or record a different version of a
10 conversation. It is opposite on that point.

11 MR. PASCARELLA: If you look at Sherrin's state-
12 ment and Coughlin's statement, they are not opposite.
13 One says he would be given back his work pass. That
14 doesn't go to what the Waterfront Commission would
15 suspend him.

16 I can put in Mr. --

17 MR. HANDMAN: This furnishing of the material
18 is not for the purpose of eliciting information for
19 the United States Attorney but to provide the defense
20 an opportunity to prepare for cross-examination. Even
21 peripheral differences are significant. If a version
22 of this conversation with the defendant was presented
23 to the Grand Jury, then by the ruling of Judge Rayfiel
24 and the agreement of Mr. Sherrin I think I might be
25 entitled to have that before the trial. I am entitled

1 to any written or recorded version of the defendant's
2 conversation. Until now I did not realize that was
3 going to be apparently so significant a part of the
4 Government's case and there probably is and was another
5 version.

6 THE COURT: Are there Grand Jury minutes?

7 MR. PASCARELLA: Yes. My recollection, and I
8 will be turning them over, is that there are no other
9 statements there. What counsel is saying, we can put
10 Mr. Sherrin on the stand and have him testify who else
11 was present and we won't be estopped and Mr. Coughlin
12 can testify what was said. No matter what Coughlin
13 wrote, he would be entitled as far as he can recollect,
14 he can testify as to what he heard the defendant say
15 after he heard the defendant advised of his rights.

16 THE COURT: I have to feel that there was some-
17 thing of substance here and I am not sure it has been
18 demonstrated that statements made by others to the
19 defendant at the time, while interesting, and helpful,
20 perhaps in this instance really, to have any bearing
21 on the issue of guilt.

22 MR. HANDMAN: I point a little further to the
23 statement of Mr. Sherrin and it really starts with I
24 did all the talking. He says what he told the defen-
25 dant.

1 THE COURT: That has been revealed to you.

2 MR. HANDMAN: He doesn't say the defendant said
3 anything and doesn't indicate whether the defendant
4 said yes I did it or explained it. He apparently in-
5 dicates the defendant acknowledges certain things.
6 The statement of Mr. Coughlin states affirmatively
7 Rodriguez admitted on June 22 he brought about two
8 ounces of cocaine. Rodriguez admitted he brought an
9 ounce of cocaine.

10 Mr. Sherrin's statement points out, he admits
11 that transaction.

12 MR. HANDMAN: There are two transactions where
13 these two statements are similar but they are different.

14 MR. PASCARELLA: The fact Mr. Sherrin is putting
15 down information he can only get from Mr. Rodriguez
16 indicates he said something to him. Is this Mr. Hand-
17 man's point, because Mr. Sherrin statement, Mr. Coughlin--

18 THE COURT: No, I don't think so. I think the
19 position is Rule 16 says what it says. If the Govern-
20 ment had this statement in its file and hadn't turned
21 it over, I think the Government would be in a lot more
22 trouble. There is a recent decision that reversed a
23 conviction because of that.

24 MR. PASCARELLA: That is where the statement
25 wasn't turned over.

1 THE COURT: But it wasn't deliberately.

2 MR. PASCARELLA: The fact is the defense didn't
3 have the statement before him and he was surprised.
4 The crux is that he has the statement so he can ade-
5 quately prepare. This was not deliberate, that this
6 was held out.

7 Even if that is the case, because he had the
8 statements before him and there will be no other state-
9 ments brought out, they could not be suppressed.

10 MR. HANDMAN: Was there any version of Mr.
11 Rodriguez' admissions or statements presented to the
12 Grand Jury?

13 MR. PASCARELLA: To the best of my recollection,
14 no.

15 An agent who just reviewed the testimony he
16 gave said no, there was not.

17 THE COURT: Anything else?

18 MR. HANDMAN: That is all.

19 THE COURT: Well, even though I would have
20 viewed this particular Court Exhibit 1 in the agent's
21 own internal report of investigation as the kind of
22 document which would squarely be covered by Rule 16,
23 because it did record statements of the defendant, I
24 cannot overlook the fact that at the time the bill of
25 particulars was furnished by the Government it contained

1 the essential information that the defendant had stated
2 to the Assistant U. S. Attorney that he admitted the
3 particular cocaine transaction, that they were talking
4 about, which I take it is the one which is embraced
5 within the indictment.

6 MR. PASCARELLA: There are two transactions.

7 THE COURT: Two transactions. That is to say the
8 other one covers the Osborne situation.

9 MR. PASCARELLA: One goes to a quarter of a
10 piece and the other one goes to the two ounces of the
11 27 and even in the notes --

12 MR. HANDMAN: There are two dates.

13 THE COURT: So that I feel it is difficult to
14 see prejudice to the defendant or indeed his counsel in
15 terms of preparing this case for trial.

16 I suppose it can be said that he is now confronted
17 with the fact that there is a corroborative witness who
18 was present, the Government agent who heard the state-
19 ments made, but I think that clue was given in the
20 original statement of Mr. Sherrin, that he sent the
21 defendant out of the room and spoke with the agent.
22 He did not identify the agent. No request was made for
23 identification of the agent.

24 MR. HANDMAN: We did request the note specifically
25 under that, but it was denied.

1 MR. PASCARELLA: He wouldn't be entitled to names
2 of witnesses who were there even if he requested them.

3 THE COURT: Whether or not they made statements?

4 MR. PASCARELLA: Not to the names of the agents.
5 If he did request it, it was denied by Judge Rayfiel.

6 THE COURT: Well, I won't overrule Judge Rayfiel
7 whom I know to be a wise, fair and learned judge.

8 Under the circumstances, construing your motion
9 in whatever way you described it, either a motion to
10 suppress the use of this particular Court Exhibit 1
11 for any purpose whatsoever or as taxing the Government
12 with failure to offer a document which would be
13 material in some way for the defense, I think I shall
14 overrule your motion, deny it, that is, believing on
15 the statement of the Assistant that there was no deli-
16 berate intent to conceal it and that it was made known
17 to the defense as soon as it came to the attention of
18 Mr. Pascarella to whom the case was assigned and there
19 is no indication that it was previously in the United
20 States Attorney's file.

21 MR. PASCARELLA: I personally in conversation
22 with Mr. Handman when he asked for various statements
23 indicated what statements were verbally over the phone
24 and they coincide with what he had.

25 MR. HANDMAN: They refer to basically what I was

1 advised as to what the statements were by Mr. Sherrin.
2 I wasn't advised about the agent's statements until this
3 morning.

4 THE COURT: Is there anything else to take up at
5 this time?

6 MR. HANDMAN: Without conceding the admissibility
7 of it, of any statement --

8 THE COURT: It wouldn't in and of itself be
9 admissible except perhaps to buttress credibility, if
10 that were attacked, if it should be attacked at any
11 given point. That is the only possible use.

12 MR. PASCARELLA: Also as admissions.

13 THE COURT: The statement in and of itself is
14 not admissible.

15 MR. PASCARELLA: If we can lay the foundation.

16 THE COURT: I am talking about this report.

17 MR. PASCARELLA: Oh, no, the paper we do not
18 intend to introduce. Just the statements, the verbal
19 statements.

20 THE COURT: The statements that were uttered,
21 I would say, if made voluntarily after due warning,
22 after constitutional rights, certainly would be
23 admissible. I am contesting the writings.

24 MR. HANDMAN: Would your Honor grant the privilege
25 of a voir dire of any statement at such time rather

1 than have it now?

2 THE COURT: I am liberal about those things. I
3 would suggest unless there is anything else we will
4 resume at 2 o'clock. There is no use trying to get
5 anybody now up here.

6 MR. PASCARELLA: To save some time I have 3500
7 material which I would like to have marked as exhibits
8 and perhaps we can do that at this time.

9 I ask these be marked as 3500 material. I will
10 provide a copy to Mr. Handman. It might be appropriate
11 to say it is agreement between counsel or it has been
12 agreed between counsel for the Government and counsel
13 for the defendant that the Government will not have to
14 show chain of custody of the evidence.

15 I have a chemical laboratory analysis report,
16 one page dated 6/30/72 which I hand to the defense
17 counsel and ask that be marked as 3500 material.

18 THE CLERK: 3500-1.

19 MR. PASCARELLA: I have a second one-page chem-
20 ical laboratory report dated July 10, 1972.

21 THE CLERK: 3500-2, so marked.

22 MR. PASCARELLA: I have a third laboratory report
23 dated July 10, 1972.

24 THE CLERK: So marked, 3500-3.

25 MR. PASCARELLA: Finally, in the laboratory

1 analysis report, another one-page report dated July 18,
2 1972.

3 THE CLERK: So marked 3500-4.

4 MR. PASCARELLA: These were turned over in
5 Mr. Sherrin's bill of particulars.

6 MR. HANDMAN: I have another problem on these
7 papers which I am not sure but right behind Mr. Sherrin's
8 statement that we were talking about before I was
9 supplied earlier with all of the tests, those were the
10 only two aspects of the bill that was complied with.
11 I was supplied with Mr. Pascarella's Exhibit 1 which
12 has notation 6/30/72, 8/17 and should be in the Court's
13 copy and I was given Mr. Pascarella's No. 2 -- no, that
14 is 5. I was only given No. 1 and never been advised of
15 the others.

16 I did get Exhibit 2.

17 MR. PASCARELLA: I am giving you the reports of
18 3500 materials that go to the exhibits. I do seek to
19 introduce these.

20 MR. HANDMAN: I never received your copies of
21 three and four. I move to strike them from the record.
22 I never got those. You can verify that with the Court's
23 copy of the bill of particulars which should have the
24 reports I did get, annexed to Mr. Sherrin's statement
25 that we spoke about before.

1 THE COURT: You are complaining that they are
2 talking about Exhibit 4 and 5?

3 What happened here?

4 MR. PASCARELLA: I do not know. As 3500 material
5 I am providing it well in advance. These are chemical
6 analyses. He knows the nature of the crime against
7 him. This involves a conspiracy.

8 THE COURT: I don't know what use the Government
9 proposes to make of these particular reports. My
10 feeling would be that the Government should not be able
11 to make any use of them on this trial.

12 MR. PASCARELLA: We won't submit them as evidence.
13 It is merely providing the laboratory analyses of the
14 chemist who will testify of his findings in connection
15 with this case.

16 THE COURT: Are there physical exhibits known
17 as 4 and 5 as described in these additional reports?

18 MR. PASCARELLA: Yes. There are other drug
19 exhibits which the Government will seek to introduce
20 that would correspond to 4 and 5 and go in on a differ-
21 ent theory.

22 Particular acts were committed during the
23 conspiracy where quantities of drugs were involved in
24 transactions not specifically enumerated in the indict-
25 ment but come within the confines of the conspiracy.

1 THE COURT: I am not so sure you can use these
2 when they weren't turned over.

3 As to those particular samples 4 and 5, I am not
4 saying 1, 2 or 3, but 4 and 5 I am not so sure. Turning
5 over these reports as trials go, when they are going
6 to start, permit the Government to use 4 and 5 and --

7 MR. PASCARELLA: If there were no other exhibits
8 and I didn't submit Exhibits 4 and 5 to defense counsel
9 and the Government during the course of its direct
10 case decided it was going to introduce evidence of prior
11 similar acts, acts in furtherance of the conspiracy,
12 I can introduce other narcotic evidence. I could have
13 held those back until that time. If counsel wishes, I
14 will provide him with the rest of 3500 material when it
15 should be provided and that is after direct of the
16 particular witness.

17 MR. HANDMAN: We are talking about the bill of
18 particulars already watered down and granted as to two
19 items as to the defendant's statements and as to any
20 chemical reports regarding any narcotics evidence
21 supposedly to be used, we have already watered it down.

22 In connection with these reports I stated the
23 dates and I studied the chain and what was involved.

24 Now I have separate exhibits and separate
25 narcotic items and different agents and it is a whole

1 new case.

2 MR. PASCARELLA: This is not a new case. I do
3 not -- well, the last word, a Court has to rule on its
4 request. There is no undue prejudice to him. I could
5 have at a later moment during the trial introduced
6 evidence of prior similar acts, of prior similar crimes,
7 acts or statements in furtherance of a conspiracy. I
8 do not see the prejudice to him.

9 The fact that he did not receive two of the
10 chemical analyses reports which would indicate cocaine
11 was involved is something he knew from the indictment.
12 I do not see how any prejudice could be worked against
13 him.

14 MR. HANDMAN: If you try to admit them later they
15 would be inadmissible. I would voice the same objec-
16 tion the Government deliberately and blatantly in
17 language above a signature of a United States Attorney
18 told me I was going to be furnished with reports of
19 all scientific texts conducted with regard to the
20 evidence used in this case and it simply wasn't done.

21 MR. PASCARELLA: I would ask counsel to demon-
22 strate his prejudice.

23 THE COURT: I cannot agree with you. I believe
24 3 and 4, while they may be marked 3500 material, if they
25 are going to be used to introduce other transactions

1 here, narcotic transactions, you are not going to be
2 able to do it. The Government's obligation in a criminal
3 case is clear and even if the Government feels at times
4 it has an awful lot to do, it is responsible for the
5 material it offers to deliver to see it is delivered
6 because somebody did not do it I realize may not be
7 or ought not to be your burden, because you inherited a
8 case from somebody else, but I have to look at both
9 sides of the case and I do believe that counsel's
10 argument that this being sprung on him at this time at
11 trial is too late.

12 MR. PASCARELLA: Have you found a specific
13 finding of prejudice worked against the defendant?

14 THE COURT: I have told you how I feel.

15 MR. PASCARELLA: Have you found a specific
16 prejudice?

17 THE COURT: I only know from your statement it
18 would be intended to show there was as part of a
19 conspiracy other cocaine transactions and in support
20 of same additional samples of cocaine would be referred
21 to and apparently which were the subject of transactions
22 at different times than those covered in the first
23 laboratory report that was turned over.

24 THE COURT: Now we will have to go over until
25 approximately 2 o'clock.

1 MR. PASCARELLA: All right.

2 (The P.M. Session of February 19, 1974.)

3 (Sidebar discussion out of the hearing of the
4 proposed jurors.)

5 MR. PASCARELLA: I know your Honor indicated you
6 would decide the matter which was before you and I
7 want to point out to you that I spoke with Mr. Sherrin
8 and he advises me that if he didn't send them it was
9 inadvertance and there has been no prejudice. Even
10 under Rule 16, 16-G, the remedies called for are, one,
11 that the Court to order disclosure or, two, to grant
12 continuance and three, and I think the cases show
13 extreme cases precluding it to be introduced at trial.

14 Certainly the defendant would have a reasonable
15 continuance to do whatever he wanted with the chemical
16 report. He has not requested same. It is not logical
17 to presume that he wants an independent chemist to look
18 at this. The amounts involved here is less than two
19 ounces and that is as far as the analysis go.

20 MR. HANDMAN: Should your Honor disturb the
21 ruling that you have made, that I thought might be
22 forthcoming, I would request a two-week continuance of
23 the case.

24 MR. PASCARELLA: He hasn't asked for that in
25 advance.

1 MR. HANDMAN: I wasn't aware of the discrepan-
2 cies and I rely on the fact that we have had arguments
3 with respect to the particulars.

4 The defendant has never been convicted of a
5 crime, never found in possession of anything and this
6 is highly prejudicial and critical matters that we are
7 talking about.

8 MR. PASCARELLA: Just a two-week continuance,
9 I don't see the point in that, but the Government had
10 said if the Court and defense counsel feel any pre-
11 judice has been worked, a continuance is needed, we
12 would go along with it. That doesn't seem reasonable
13 at this time.

14 MR. HANDMAN: The case involves two or three
15 dates.

16 THE COURT: Would you appeal the rulings that
17 have been made?

18 MR. PASCARELLA: It may be a possibility. The
19 Government does not see any prejudice. You may say
20 the Government didn't turn over this report as they
21 perhaps should have, but no prejudice has been worked
22 upon them.

23 As well as the arguments I made before about
24 a prior similar act or acts in furtherance of a
25 conspiracy, I could have gotten those in.

1 MR. HANDMAN: I would like to have an opportunity
2 to show the prejudice if your Honor please.

3 I would like to do that tomorrow morning.

4 THE COURT: How could you show prejudice beyond
5 what appears here?

6 MR. HANDMAN: Suppose he had alibi witnesses or
7 suppose he was in and out of the apartment. This is
8 an entirely different thing. This is an entirely
9 different case because I don't know what happened to
10 the co-defendant. The co-defendant was a major narcotics
11 seller and was involved in several peripheral items.
12 He had all kinds of people running in and out of his
13 apartment.

14 This guy can be getting a bum rap because of
15 his association.

16 THE COURT: Let us not stray from the issue.
17 These reports simply deal with the analysis of the
18 substances. They are only laboratory reports.

19 Now, with respect to the first three, did you
20 consult an expert?

21 MR. HANDMAN: No. It is not 3500 material that
22 I am objecting to. I am objecting to its admission.

23 THE COURT: That is something else.

24 Those reports only involve chemical analyses.
25 A lot depends, it seems to me, on the question of

1 whether the Government in furnishing a bill of parti-
2 culars precluded from putting in other evidence of
3 similar offenses and so forth and I am inclined to
4 think it is not, that it is a familiar rule on issues
5 of intent, knowledge, purpose and design that other
6 evidence of a prior similar offense may be utilized.

7 Now, I think in a way the question of whether
8 or not these other reports that are being marked here
9 which really deal with chemical analyses are such that
10 wouldn't unfairly prejudice you because you didn't get
11 what you should have gotten.

12 MR. HANDMAN: We are walking into a trap.

13 MR. PASCARELLA: I resent that.

14 THE COURT: I cannot rule on the evidence now.
15 I have to wait until specific questions are asked and
16 if you have an objection at that time you make your
17 objection and I will consider it.

18 MR. HANDMAN: I think the question is if that
19 is the correct light to view it in whether a prior
20 similar act of an alleged co-conspirator can be used
21 or introduced.

22 THE COURT: No. For present purposes I am
23 simply saying that you mark those court exhibits and
24 I will treat the matter as one of evidence when it
25 comes in. We will see at that time what uses are going

1 to be made of it.

2 MR. PASCARELLIA: I take it your ruling to be
3 that you are not excluding any evidence because two
4 laboratory reports were not turned over. The laboratory
5 reports only go to analyses and they do not restrict
6 the Government's proof.

7 The Government intends to bring out the testimony
8 that would show negotiations with the defendant and even
9 if it goes to co-defendants acting in the course of
10 the same conspiracy they want to bring out evidence of
11 narcotic transactions during this period of time not
12 laid out in the indictment but are similar acts.

13 THE COURT: The Government does not have to
14 set out its evidence in the indictment. The rulings
15 on evidence will be made when the evidence comes in,
16 but I wouldn't say that evidence would be excluded on
17 the sole ground of a chemical analysis report because
18 that deals with physical evidence.

19 I suggest that we go ahead and start on the
20 selection of the jury before it is too late.

21 MR. HANDMAN: Did you say to me now there were
22 negotiations with the defendant or there were other
23 conversations and didn't -- well, you didn't supply
24 those conversations to me?

25 MR. PASCARELLIA: My understanding of the law is

1 that statements made during the course of a conspiracy
2 are not the type of statements --

3 MR. HANDMAN: If they are the defendant's state-
4 ments they are certainly statements.

5 THE COURT: We are talking about statements made
6 as a result of admissions by him after he had been
7 arrested. That is the kind of statements we are talking
8 about. The other statements he makes during the course
9 of the commission of the crime has nothing to do with
10 it.

11 If he says do you want to buy this, you are not
12 entitled to that.

13 All right. Let us prepare or begin the selection
14 of the jury.

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2 A The same rights I previously stated, the right
3 to remain silent, anything he said could be used against him
4 in a Court of law or other proceeding; that he had a right
5 to an attorney; that if he could not afford an attorney that
6 an attorney would be appointed for him by the Court. He
7 could waive these rights but if he wanted to reinstate them
8 at any time he could do so.

9 Q Did there come a time when you, on the 24th of
10 July, 1972, when you appeared with the defendant Osmundo
11 Rodriquez in the office of Assistant United States Attorney
12 Francis Sheerin?

13 A Yes, I did, at approximately 4:30 that same
14 afternoon.

15 Q Would you tell the Court and jury what if
16 anything happened at that time?

17 A At that time Assistant U. S. Attorney Sheerin
18 again read Osmundo Rodriquez his rights. He showed him a
19 BND form 14A with the rights printed in English. He asked
20 Mr. Rodriquez to read them. Both times Osmundo Rodriquez said
21 that he understood his rights.

22 Q Subsequent to that, did Osmundo Rodriquez make
23 any statements in your presence?

24 A Yes.

25 MR. HANDMAN: Objection. I would like to have a

voir dire on the rights being administered to the defendant.

THE COURT: I don't think a voir dire is necessary if Mr. Pascarella will ask this witness what was said.

BY MR. PASCARELLA:

Q What rights was Mr. Rodriguez advised of by Mr. Sheerin?

A Mr. Sheerin advised Mr. Rodriguez that he had the right to remain silent. He advised him that anything he said could be used against him in a Court of law or other proceedings. He advised him that he had a right to an attorney, if he could not afford an attorney, an attorney would be appointed to him by the Court; that if he wanted to he could waive these rights and answer the questions put to him by Mr. Sheerin or myself; that any time he wished to re-invoke these rights he could do so.

Q I'm sorry. Did he also indicate --

MR. PASCARELLA: May I have the answer read back, your Honor? I just missed part of the answer. I would like it read.

MR. HANDMAN: If your Honor please, the reason I requested a voir dire was to inquire generally about the voluntary nature of any statements, and I want to

1
2 go into the circumstances, who was present, the
3 language used, and whether or not the defendant was
4 able to understand what was transpiring at that time.

5 THE COURT: All right. I will permit a voir
6 dire.

7 MR. PASCARELLA: Before that, your Honor, may
8 I have the answer read back.

9 THE COURT: Yes.

10 (Answer read.)

11 MR. HANDMAN: Should I proceed, your Honor?

12 THE COURT: You may proceed with the voir dire.

13 VOIR DIRE EXAMINATION

14 BY MR. HANDMAN:

15 Q Agent Coghlan, how many times to your knowledge
16 are you required to read the rights to a defendant?

17 A Once, sir.

18 Q Now, you have told us you read it to him once
19 at his house when you arrested him?

20 A Yes.

21 Q And you read it to him once when you brought
22 him into your headquarters?

23 A Yes sir.

24 Q And they were read to him again when you brought
25 him before the U. S. Attorney?

A Yes sir.

Q And then they were given to him to read himself?

A Yes sir.

Q Is there any doubt in your mind or was there any doubt in your mind as to whether or not he understood what was going on, any doubt that caused you to repeat something four times which you only needed to do once?

A No sir. It's simply a matter of policy that we go through.

Q Didn't you indicate that the policy or the law was that the defendant need be apprised of his rights once?

A The law is, I believe, that you only need to apprise him of his rights once. However, it is the policy of the Drug Enforcement Administration to read him his rights when he is arrested and when he is processed, and I believe it is the policy of the United States Attorney's office to again advise him of his rights when he is brought into the office of the Assistant United States Attorney.

Q During all these times up until we get to the last time, did he make any statements to you?

A He did make one brief statement in our office that involved a man by the name of Tacajo as his source for the cocaine, but that's all he said.

Q When you say you took him to understand his

rights, how did you come to that conclusion?

A Because he said he understood them, sir.

Q What words did he use?

A I asked him, "Do you understand?" He said, "Yes, I do." I assumed that meant that he understood his rights.

Q Did he say, "Yes, I do," clearly like that?

A Yes, clearly, very clearly.

Q Each time?

How many agents were present with you on this last occasion when he was questioned by Assistant U. S. Attorney Sheerin?

A One agent, sir, Lynn Wheeler.

MR. HANDMAN: I have no further questions.

DIRECT EXAMINATION

BY MR. PASCARELLA (Cont.):

Q After being advised of his rights by Mr. Sheerin on July 24, 1972 --

MR. HANDMAN: Excuse me, your Honor. I want to register an objection here which is on the basis of the discovery information which was --

MR. PASCARELLA: Your HONor, if we are going to discuss that, perhaps we should go to the side-bar.

(Side bar.)

1
2 MR. HANDMAN: I just want to renew my objection
3 to any evidence of any admissions made to Mr. Coghlan
4 on the basis that this was not furnished to me in the
5 discovery and inspection material ordered by the Court
6 previously and that only disclosure of a conversation
7 had was a conversation with Mr. Sheerin.

8 MR. PASCARELLA: Your Honor has already ruled
9 on that. That has to do with both of them being present
10 and both having heard it. We turned over the state-
11 ment from Mr. Sheerin which your Honor found did not
12 differ from the statements which Mr. Coghlan said he
13 made.

14 THE COURT: I will adhere to that ruling.

15 (Open Court.)

16 BY MR. PASCARELLA:

17 Q I ask you again, Special Agent Coghlan, after
18 being advised of his rights by Assistant United States
19 Attorney Sheerin, did the defendant Osmundo Rodriquez make
20 any statements in your presence on July 24, 1972?

21 A Yes, he did.

22 Q And what were those statements, to the best of
23 your recollection?

24 A To the best of my recollection, he stated that
25 he had been into cocaine for about a year. I took it to mean

that he had been using cocaine for a year. He said that he -- he admitted to bringing over what he termed a quarter piece of cocaine to Special Agent Abbott and myself on June 23, 1972. By a quarter piece is simply meant a quarter ounce which was about the size of the sample.

Q I show you now exhibit 1-A in evidence, Agent Coghlan. Is that the sample you took Osmundo Rodriguez to be referring to?

A Yes, I did.

Q Would you continue with what further statements, if any, Osmundo Rodriguez made at that time?

A He also admitted to bringing us the second part of the eighth, second half of the eighth on the 27th of June of '72, late in the evening.

Q I show you now exhibit 3-A in evidence and ask you if you took Osmundo Rodriguez to mean he was referring to exhibit 3-A?

A Yes, I do.

Q Were there any other further statements made by Mr. Rodriguez at that time?

A Yes. He told us again that the individual who his connection was a man by the name of Tacago or Tacajo, but he supplied no further information about the identity of this man.

Summation-Pascarella

1
2 let that aid you in determining what the truth is.

3 Yes, use your common sense. Ladies and gentle-
4 men, you heard the witnesses when they testified, but
5 I ask you to go beyond the words, go to their demeanor
6 and how they handled themselves on the witness stand,
7 and let that aid you in the quest of the truth, in
8 what they have spoken.

9 I listened to summation of defense counsel,
10 Mr. Handman, and it seemed to me a good part of the
11 summation was that the Government witnesses lied.
12 John Osborne and all of them. Well, if you believe
13 Agent Coughlin lied, if you believe Agent Abbott lied,
14 if you believe Agent Gormandy lied, if you believe
15 Agent Wheeler lied, if you believe John Osborne lied,
16 then I say to you now, ladies and gentlemen --

17 MR. HANDMAN: Objection, your Honor.

18 MR. PASCARELLA: (Continuing) -- acquit the
19 defendant.

20 MR. HANDMAN: As a matter of fact I indicated that
21 I agreed with the testimony of Agent Gormandy and
22 Agent Wheeler, who were conducting the surveillance,
23 and the chemist also.

24 MR. PASCARELLA: My recollection of Mr. Handman's
25 summation was that he agreed with the parts that he

AFTERNOON SESSION

Charge of the Court

THE COURT: Good afternoon, members of the jury. We are now at the stage of the trial where you are about to undertake your final function as jurors. Your duty is a serious and important one. In performing it you actively share with the Court the responsibility of administering justice according to law. Your oath as jurors obliges you to discharge this final task in an attitude of complete fairness and impartiality -- and, as was emphasized by me when you were selected as jurors -- without bias or prejudice, for or against the government or the defendant as parties to this controversy. This case has been of relatively short duration. The fact that the trial has been such, however, in no way reflects its relative importance. Every case whether it takes a day, a week or a month is important.

The case is important to the government, since the enforcement of the criminal law is of prime importance to the welfare of the community.

Obviously, it is equally important to the defendant who is charged with a serious crime and who has the right to receive a fundamentally fair trial. The community has an interest in that too.

Charge of the Court

Let me add:

The fact that the government is a party entitles it to no greater consideration than that accorded to any other party to a litigation.

By the same token, it is entitled to no less consideration. All parties, government and individuals alike, stand as equals before the bar of justice.

Your role is to decide and pass upon the fact issues in the case. You are the sole and exclusive judges of the facts. You determine the weight of the evidence; you appraise the credibility of the witnesses; you draw the reasonable inferences from the evidence; you resolve such conflicts as there may be in the evidence.

My function at this point is to instruct you as to the law, and it is your duty to accept the law as I state it to you in these instructions, and to apply it to the facts as you may find them.

With respect to any fact matter, it is your recollection, and yours alone, that governs. Anything that counsel, either for the government or the defense, may have said with respect to matters in evidence, whether during the trial, in a question, in argument, or in summation is not to be substituted

Charge of the Court

for your own recollection of the evidence.

So too anything the Court may have said during the trial or may refer to during the course of these instructions, as to any matter in evidence, is not to be taken in lieu of your own recollection.

Before we consider the precise charge against the defendant on trial, some preliminary instructions are in order. There are certain principles of law which apply in every criminal case and to which I made reference and emphasized at the time of your selection as jurors, and some of which I had occasion to repeat several times during the trial.

I repeat them now:

The indictment is merely an accusation, a charge. It is no evidence of the defendant's guilt. The defendant has pleaded not guilty. The government has the burden of proving the charge against the defendant beyond a reasonable doubt. The defendant does not have to prove his innocence. He is presumed to be innocent of the accusations contained in the indictment.

As I told you at the start of the trial, the presumption of innocence was in his favor then, it was present during the entire course of the trial, is

Charge of the Court

in his favor even as I instruct you now; and still continues in his favor during the course of your deliberations in the jury room.

It is removed only, if and when, you are satisfied that the government has sustained its burden of proving the guilt of the defendant beyond a reasonable doubt.

The question that naturally comes up is what is a reasonable doubt? The words almost define themselves -- that there is a doubt founded in reason, and arising out of the evidence in a case, or the lack of evidence. It means a doubt which a reasonable person has after carefully weighing all the evidence. Reasonable doubt is a doubt which appeals to your reason; your judgment; your common sense; and your experience. It is not caprice, whim or speculation. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant. If, after a fair and impartial consideration of all the evidence you can candidly and honestly say that you are not satisfied of the guilt of the defendant, that you do not have an abiding conviction of the defendant's guilt -- in sum, if you have such a doubt as would cause you, as prudent persons, to

Charge of the Court

hesitate before acting in matters of importance to yourself, then you have a reasonable doubt and in that circumstance it is your duty to acquit.

On the other hand, if after such an impartial and fair consideration of all the evidence you can candidly and honestly say you do have an abiding conviction of the defendant's guilt -- such a conviction as you would be willing to act upon in important and weighty matters in the personal affairs of your own life, then you have no reasonable doubt and under such circumstances it is your duty to convict.

One final word on this subject. A reasonable doubt does not mean a positive certainty or beyond all possible doubt. If that were the rule few persons, however guilty they might be, would be convicted.

It is practically impossible for a person to be absolutely and completely convinced of any controverted fact, which by its nature is not susceptible of mathematical certainty.

In consequence, the law in a criminal case is that it is sufficient if the guilt of a defendant is established beyond a reasonable doubt -- not

Charge of the Court

beyond all possible doubt.

With the foregoing general instructions, let us turn to the indictment.

As you know, the indictment in this case contains three separate charges against the defendant on trial, Osmundo Rodriquez.

In Count 1 it is alleged that on or about June 23rd, 1972, the defendant together with another defendant named in that count, John William Osborne, did knowingly and intentionally distribute approximately 6 grams of cocaine hydrochloride, a Schedule II narcotic drug controlled substance in violation of Title 21 United States Code Section 841(a) and Title 18 United States Code Section 2.

In Count 2 it is alleged that on June 27th, 1972, four days later, the defendant John William Osborne again named in that count as a defendant and the defendant on trial, Osmundo Rodriquez, did knowingly and intentionally distribute approximately 60 grams of cocaine hydrochloride in violation of the same statutes mentioned under Count 1.

Now Count 3 is of a slightly different tenor. That count alleges that on or about and between June 20th and June 28th of 1972 the two defendants named

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-- that is John William Osborne and the defendant here on trial, Osmundo Rodriguez -- did knowingly and willfully conspire to commit an offense against the United States in violation of Title 21 United States Code 841(a) by conspiring to distribute a quantity of cocaine in violation of Section 846 of Title 21.

It is further alleged in that count, Count 3, that in furtherance of the said unlawful conspiracy and to effect the objectives thereof the defendants committed the following overt acts:

One, on or about June 23rd, 1972 John William Osborne gave approximately 6 grams of cocaine to an agent of the Bureau of Narcotics and Dangerous Drugs.

Now, Count 1 and Count 2 which I have just read to you charge the defendant on trial with what we call substantive violations of the Federal Drug Abuse and Control Act. That act was enacted by Congress in an effort to combat the illegal importation, distribution, possession and improper use of narcotic drugs, which have a substantial and detrimental effect on the health and general welfare of the American people. In that same law Congress has provided that any

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2 person who attempted or conspired to violate its
3 provisions would be guilty of a separate crime, and
4 that is the charge made in Count 3 -- the so-called
5 conspiracy count.

6 Now, you heard me mention some of the statutory
7 references and let me just state that Counts 1 and 2,
8 the substantive counts are based under Section 841(a),
9 which provides as follows:

10 "It shall be unlawful for any person knowingly
11 or intentionally to distribute or possess with
12 intent to distribute a controlled substance."

13 You will note that the statute uses the term
14 a "controlled substance." I instruct you as a matter
15 of law that if you should find beyond a reasonable
16 doubt that the white powder contained in Government's
17 Exhibits 1, 2 and 3 is composed in whole or in part
18 of cocaine hydrochloride, that would be a controlled
19 substance within the meaning of the statute.

20 As I have indicated, under Section 21, United
21 States Code 846, Congress has provided that "any person
22 who attempts or conspires to commit any offense defined
23 in this" Drug Abuse and Control Law shall be punished
24 by imprisonment or fine.

25 I might add that there is another statute under

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the United States Code of Criminal Law which comes into play. That is Section 2 which is mentioned in the two substantive counts. It is sometimes known as the "Aiding and Abetting Law." That law provides that whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal. I will explain what that means later on.

Now, let us turn back to Count 1.

In order to find the defendant on trial guilty under Count 1, the government must establish beyond a reasonable doubt the following essential elements:

One, that the defendant, Osmundo Rodriquez, knowingly or intentionally distributed -- as charged -- with intent to distribute approximately 6 grams of cocaine as referred to in that count on or about June 23rd, 1972.

Now, you will note the statute uses the words "knowingly or intentionally." It is equally an important element that the government must establish beyond a reasonable doubt that the defendant on trial became possessed of the cocaine deliberately and purposefully aware that he became possessed of it -- that he knew what he was doing and that such possession

and such action by way of distribution on his part was not due to inadvertence, negligence or mistake.

Now, a word about the term "possess" as I have used it. This may be of two types, actual or constructive. Actual possession means that a person knowingly has manual or physical control or custody of the drugs -- that they are in his personal possession.

Constructive possession means that although the narcotics are in the manual and personal possession of another, a defendant has the power to exercise control over them or to direct their disposition or distribution or to set the price for their sale or otherwise to exercise dominion or control over them. Either type of possession may be proved by direct or circumstantial evidence or a combination of both.

(Continued on next page.)

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THE COURT (Cont.): In other words, it is necessary here for the government to establish that the defendant here on trial, Osmundo Rodriquez, intended to dispose of the cocaine by its distribution, transfer or sale or by aiding in such transfer, distribution or sale to another person or persons, that the cocaine was not for his own personal use. It means a state of mind or purpose to transfer the cocaine to others.-- a deliberate and intentional purpose to do so.

Now, a final element which I have already averted to is that the government must establish beyond a reasonable doubt that the substance in fact was cocaine, a narcotic drug. Of course in this case you may recall one of the government witnesses was a chemist from the Drug Enforcement Administration who testified here before you concerning his analysis of the contents of the three packages received into evidence as government exhibits 1, 2 and 3.

Now, as I said under Count 1 the government also relies upon the aiding and abetting statute which I read to you earlier. It is not necessary under that statute for the government to show that the defendant here on trial personally committed the

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1
2 crime charged. Under that law a person who aids
3 and abets another to commit an offense is just as
4 guilty of the offense as if he himself committed
5 every act related to it. Accordingly, you may find
6 the defendant guilty of the substantive offense in
7 Count 1 if you find beyond a reasonable doubt, as
8 the government charges, that the defendant John William
9 Osborne, not here on trial, committed the actual
10 offense and that the defendant on trial, Osmundo
11 Rodriquez, aided and abetted him.

12 In order to find that Osmundo Rodriquez did
13 aid and abet John Osborne in possessing the cocaine
14 with intent to distribute it and distributing it,
15 you must be satisfied that Rodriquez in some way
16 knowingly associated himself with the criminal venture
17 in a meaningful way -- that he knowingly participated
18 in it as something he wished to bring about and by
19 some action of his to make it succeed -- that he had
20 a stake in its outcome.

21 In other words, if one is fully aware of what
22 he is doing and plays a significant role in further-
23 ing a transaction prohibited by law, he is an aider
24 and abettor and as such he is equally guilty with the
25 person who directly performed the illegal act which

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constitutes the crime.

Now, in Count 2 the charge of distribution is repeated only differing in that the transaction alleged occurred four days later on June 27th, 1972 and that the quantity of cocaine there involved weighed 60 grams. Everything that I have said to you with respect to Count 1, as to the burden of the government to establish beyond a reasonable doubt all those elements, apply with equal force to Count 2 so it will not be necessary for me to elaborate any further on that score.

Now we will get to Count 3, the conspiracy count. You might wonder what is a conspiracy? Well, the idea is a very simple one. A conspiracy is a combination, an agreement or an understanding of two or more persons by concerted action to accomplish a criminal or unlawful purpose. In this instance to bring about or produce one might say quantities of cocaine with the intention of making a distribution of the cocaine to another person usually for money, although money is not essential.

I might add in this connection too, that so far as distribution is concerned it could occur if you find from the evidence that Rodriguez here on

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trial procured the cocaine and transferred it to Osborne with the idea that Osborne would then pass it along.

Now getting back to conspiracy. The gist of the crime is not committing an offense, but rather the agreement or combination to violate the law. It is the agreement which is the criminal act, if one may call it that. The success or failure of the conspiracy is immaterial to the question of guilt or innocence of a conspirator.

To establish a conspiracy, the government is not required to show that two or more persons sat around the table and entered into a solemn pact, orally or in writing, stating that they have formed a conspiracy to violate the law, or the details or the means by which its object was to be achieved.

Common sense will tell you that when persons in fact undertake to enter into a criminal conspiracy, much is left to the unexpressed understanding.

What the evidence must show in order to establish that a conspiracy existed is that the members in some way or manner, impliedly or tacitly, came to a common understanding to violate the law or to accomplish an unlawful plan.

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Now, in determining whether there has been an unlawful agreement you may judge acts and conduct of the alleged co-conspirators which are done to carry out an apparent criminal purpose. These include conversations and discussions among them to that end.

Usually, the only evidence available is that of disconnected acts and conduct on the part of the alleged individual conspirators, which acts and conduct, however, when taken together in connection with each other, and, considered as a whole, permit an inference that a conspiracy did in fact exist.

Now, you must first determine from the proof produced by the government whether or not it establishes beyond a reasonable doubt the existence of the conspiracy as charged in the indictment.

In deciding this first element, you consider all the evidence which has been admitted with respect to the conduct, acts and declarations of each alleged co-conspirator, and that includes the two named in the indictment, John William Osborne and the defendant on trial, Osmundo Rodriquez.

It is sufficient to establish the existence of the conspiracy if, from the proof of all the relevant facts and circumstances, you find beyond a reasonable

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2 doubt that the minds of at least two alleged co-
3 conspirators met in an understanding way to accomplish
4 by the means alleged one or more objects of the con-
5 spiracy as charged in the indictment.

6 In this case only one of the alleged co-conspirators
7 is here on trial. It is not necessary for the Gov-
8 ernment to prove the existence of the conspiracy
9 that two or more of the co-conspirators be on trial.
10 Moreover, a single defendant's participation in the
11 conspiracy, if you find a conspiracy did in fact exist,
12 must be established by independent evidence of his
13 own acts, statements and conduct as well as those of the
14 other alleged co-conspirators, and the reasonable
15 inferences to be drawn therefrom.

16 Mere association of the defendant with an
17 alleged conspirator or conspirators does not establish
18 his participation in a conspiracy, if you find one
19 did exist, nor is knowledge of illegal acts of others
20 sufficient.

21 Thus, the mere existence of an association or
22 a friendship between a defendant and alleged co-
23 conspirator, by itself, would not be sufficient to
24 establish the defendant's participation in the
25 conspiracy.

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So much for Count 3.

Now, each counsel in this case in his summation has reviewed at length the evidence, so any attempt on my part to supply further details would be mere repetition. The case was of relatively short duration. I am sure all the testimony is fresh in your mind.

(Continued on next page.)

EK nxb9

Now I often say to jurors that the state of a

1 person's mind -- his knowledge or his intent -- is as
2 much a fact as the state of his digestion. Medical
3 science has not, as yet, devised an instrument to
4 record what is in one's mind. Rarely is direct
5 evidence available to prove that a person has knowledge
6 of a fact or what his intent was. Sometimes a person
7 may write a letter or make a statement setting forth
8 what he says his intention is, but this is unusual.
9

10 Usually, a person's knowledge or intent is
11 determined by circumstantial evidence. Thus, a man's
12 knowledge and intent may be more clearly and con-
13 clusively shown by his acts, conduct, and all these
14 surrounding circumstances as of the time the events
15 occurred, than by words or explanations long after
16 their occurrence. In other words, from facts that
17 have been established, one infers, on the basis of
18 experience, the ultimate fact to be established.

19 Frequently, the acts of men speak their
20 intentions and knowledge more clearly than their
21 words.

22 Now I have made reference here to circumstantial
23 evidence. The basic difference between circumstantial
24 evidence and what we refer to as direct evidence is
25 that direct evidence refers to a witness' testimony

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2 as to what he saw or heard, something that came to him
3 by virtue of his senses. In the case of circumstantial
4 evidence, proof is given of facts which directly do
5 not prove the ultimate facts sought to be established,
6 but from which, by common experience, one may logically
7 and reasonably infer the ultimate facts sought to be
8 established.

9 Circumstantial evidence, if believed, is of
10 no less value than direct evidence, for in any event,
11 you must be convinced beyond a reasonable doubt of a
12 defendant's guilt.

13 Guilty knowledge may be inferred from a
14 clandestine, devious or irregular manner in which a
15 transaction is carried out. Guilty knowledge may
16 be inferred from circumstances of secrecy or
17 concealment or attempts to conceal the true nature
18 of a transaction.

19 In this case, the Government's position is that
20 it has carried the requisite burden of proof by
21 both direct and circumstantial evidence. The direct
22 evidence it refers to is , of course, the testimony
23 of John William Osborne, named in the indictment as
24 an accomplice and co-conspirator of the defendant on
25 trial.

1
2 Before I discuss the rules of law which apply
3 to accomplice testimony, I should remind you, as I
4 think I mentioned during the course of the trial,
5 that the fact that John William Osborne has pleaded
6 guilty in this case is no proof whatever of the
7 guilt of this defendant who is on trial. His plea,
8 that is to say Osborne's plea of guilty, may not
9 be used by you in any way as evidence against or
10 unfavorable to this defendant on trial. You may,
11 however, consider Osborne's admissions of guilt in
12 evaluating his testimony and determining whether or
13 not he is interested in or concerned with some
14 consideration in giving his testimony.

15 All the evidence of a witness who's self-
16 interest or attitude is shown to be such as might
17 tend to promote testimony unfavorable to an accused,
18 should be considered with caution and weighed with
19 great care.

20 As I said, the Government's case here in
21 substantial measure, rests upon the testimony of
22 John Osborne, who by his own admission, was a parti-
23 cipant in the alleged distribution of the cocaine and
24 the alleged conspiracy.

25 In addition, he has acknowledged the commission

1
2 of other similar acts for which he has been
3 prosecuted and for which he also expects some kind
4 of consideration by way of leniency. However, let me
5 point this out to you:

6 In the prosecution of crime, the Government,
7 of necessity, is frequently compelled to rely upon the
8 testimony of accomplices or persons who themselves
9 have engaged in criminal acts. Often, it has no
10 choice in the matter. The Government must take the
11 witnesses to the transaction as they are. If
12 accomplices could not be used, in many instances it
13 would be difficult to detect and prosecute wrongdoers,
14 and this is particularly true in the case of con-
15 spiracy. Frequently it happens that only members of
16 a conspiracy have evidence that is relevant to and
17 important in a case if the prosecution is to succeed.

18 However, again, the testimony of an accomplice
19 must be examined with great caution and care.

20 Unless you are satisfied beyond a reasonable
21 doubt that the witness Osborne spoke the truth here
22 before you, you may not convict this defendant upon
23 his testimony alone.

24 Do you understand?

25 The defendant in this case, Osmundo Rodriguez,

1
2 did not testify. That is his absolute right and in
3 no respect may such a failure to testify be considered
4 by you as any evidence against him or as a basis for
5 any presumption or inference unfavorable to him.

6 However, the Government, as part of its case,
7 offers certain statements made by him out of court
8 to an Assistant United States Attorney then handling
9 the case.

10 In this connection, I instruct you that any
11 evidence relating to any statement, act or omission
12 claimed to have been made or done by a defendant
13 outside of court and after a crime has been committed,
14 should always be considered with caution and weighed
15 with great care, and all such evidence should be
16 disregarded entirely unless the evidence in the
17 case convinces you, the jury, beyond a reasonable
18 doubt, that the statement or act or omission was
19 knowingly made or done.

20 As I said before, a statement or act or
21 omission is knowingly made or done if done voluntarily
22 and intentionally and not because of mistake or
23 accident or other innocent reason.

24 In determining whether any statement made
25 by a defendant said to have been made by a defendant

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2 outside of court and after a crime has been committed
3 is knowingly made or done, you, the jury, should con-
4 sider his age, training, education, occupation,
5 physical and mental condition and his treatment
6 while in custody or interrogation as shown by the
7 evidence in the case, and also all other circumstances
8 in evidence surrounding the making of the statement,
9 and that is including whether before the statement
10 was made the defendant knew or had been told and
11 understood he was not obligated or required to make
12 or do the statement claimed to have been made or done
13 by him; that any statement or act or omission which
14 he might make or do can be used against him in court;
15 that he was entitled to the assistance of counsel
16 before making any statement, either orally or in
17 writing, or before doing any act or omission; and
18 that if he were without money or means to retain
19 counsel of his own choice, an attorney would be
20 appointed to advise and represent him free of cost and
21 obligation.

22 If the evidence in the case does not convince
23 you beyond a reasonable doubt that a confession was
24 made voluntarily and intentionally, you should dis-
25 regard the confession entirely.

On the other hand, if the evidence in the case does show beyond a reasonable doubt that a confession was, in fact, voluntarily and intentionally made by a defendant, you may consider it as evidence in the case against the defendant who made it.

Unquestionably, you must recognize that there are issues of fact that you are going to have to decide in this case. How do you determine where the truth lies?

(continued on the next page.)

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2 In your search for the truth you are to be
3 guided by your plain, everyday common sense. When
4 you enter the door of the courtroom and sit in the
5 jury box, you are not supposed to leave your common
6 sense outside. You are all persons of experience
7 drawn from different walks of life. You determine
8 fact issues involving the credibility of persons in
9 the same way you would determine that kind of
10 question if you were called upon to act in an
11 important matter where you are personally involved.

12 You have seen the witnesses on the stand and
13 observed their manner of giving testimony. How did
14 the witness impress you, how did his version of what
15 occurred impress you?

16 A degree of credit to be given a witness,
17 should be determined by his or her demeanor, his or
18 her conduct on the stand, whether or not one is
19 interested in the outcome of the case, whether a
20 witness has colored his or her testimony. Did the
21 witness' version appear straightforward and candid,
22 or did he or she try to hide some of the facts?

23 You may also consider whether or not there
24 is a motive on the part of any witness to testify
25 falsely. It is for you to decide what interest has

1
2 affected, if at all, the testimony of any witness.

3 However, it by no means follows that simply
4 because a person is interested in the outcome of the
5 case, that he or she is not capable of telling the
6 truth and giving a straightforward story of an
7 occurrence.

8 You alone determine what credence shall be
9 given to the testimony of any witness, whoever it
10 might be, Government agent or lay witness, just as
11 you do in the case of all witnesses.

12 If you find that any witness, Government or
13 defense, has wilfully testified falsely as to any
14 material fact, you have a right to reject the
15 testimony of that witness in its entirety, or to
16 accept that part or portion which commends itself
17 to your belief, or which you may find is corroborated
18 by other evidence.

19 During the course of this trial, as I mentioned
20 at the outset, it has become the duty of counsel to
21 make objections at various points and for the
22 Court to make rulings on them in accordance with its
23 understanding of the law. You, the jury, should not
24 consider or be influenced by the fact that such
25 objections were made or by whatever rulings the Court

1
2 made with respect to them. Your function is to weigh
3 the evidence in the case and to determine the guilt or
4 innocence of the defendant, solely upon the basis of
5 such evidence and these instructions.

6 If the Government has sustained its burden of
7 proof, your verdict should be guilty. If it has
8 failed, then your verdict shall be not guilty.

9 Under your oath as jurors, you cannot allow
10 a consideration of the punishment which may be inflicted
11 upon a defendant if convicted to enter into your
12 deliberations or to influence your verdict in any
13 way. The duty of imposing sentence rests solely
14 with the Court. This is a matter of the Court's
15 judgment and responsibility which is shared with no
16 one.

17 Each juror is entitled to his or her opinion,
18 but each should, however, exchange views with his
19 fellow jurors. That is the very purpose of jury
20 deliberation, to discuss and to consider the evidence,
21 to listen to the arguments of fellow jurors, to
22 present your individual views, to consult with one
23 another and to reach an agreement based solely and
24 wholly on the evidence, if you can do so, without
25 violence to your own individual judgment.

Each one must decide the case for himself or herself after consideration with his fellow jurors of the evidence in the case. But you should not hesitate to change an opinion which after discussing with your fellow jurors, appears erroneous. However, if after a careful consideration of all of the evidence and the arguments of your fellow jurors, you entertain a conscious view that differs from others, you are not to yield your conviction simply because you are outnumbered or outweighed.

Your final vote must reflect your conscientious conviction as to how the issues should be decided.

You must consider each count in the indictment separately and render a separate verdict as to each count.

Thus you may render a verdict of guilty on one count, on two counts or on three counts, or, on the other hand, a verdict of not guilty on one or more counts, or of not guilty on all counts.

The verdict with respect to each count, whether guilty or not guilty, must be unanimous.

Before I tell you to start talking among yourselves about the case, I'm going to recess you for a few minutes to give counsel an opportunity to review

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2 with me my instructions in case I have misspoken or
3 omitted anything which should be included.

4 Before I do that, however, the time has come
5 for me to perform a duty which I always approach
6 with reluctance, and that is to separate the two
7 alternate jurors from the rest of your brethren,
8 because only 12 jurors may deliberate on a case.

9 I appreciate the careful attention and your
10 patient attendance, and I can only say that your
11 function here has now been fully served since all the
12 other jurors are present, so I will excuse you with
13 our thanks.

14 You may go in and get your things and go on
15 downstairs and check out.

16 ALTERNATE JUROR NO. 1: Thank you.

17 ALTERNATE JUROR NO. 2: Thank you.

18 (Both alternate jurors having been excused
19 and left the courtroom.)

20 THE COURT: Now, all right, when the other
21 two alternate jurors have left, you may enter the
22 jury room.

23 (At 3:15 o'clock P.M. the jury then left the
24 courtroom.)

25 THE COURT: Do counsel want to come up here?

1 MR. PASCARELLA: Your Honor, I do have a
2 couple of items I wish to bring to the Court's
3 attention, one is just a minor item:

4 When the Court was referring to count two,
5 he said that the Government's burden, etcetera, as
6 spoken by the Court in count one, pertains to count
7 two, but the Court did not also indicate that aiding
8 and abetting was charged in count two, and that is
9 to the best of my recollection, and as I say, it is
10 a small thing.

11 THE COURT: I did say that, I did definitely
12 say that.

13 MR. PASCARELLA: The second and more important,
14 your Honor indicated that it was the Government's
15 position that the case was proved by direct and
16 circumstantial evidence and you indicated that our
17 only direct evidence was John Osborne's testimony,
18 which I most respectfully take issue with at this
19 point because the agent testified also regarding
20 direct testimony, the conversation relating to
21 Osmundo Rodriquez, this was all direct evidence, and
22 so rather than have the jury under a misapprehension,
23 we ask that you instruct the jury that that is also
24 direct evidence.

25 THE COURT: Was it your impression that I said

1 that, only direct evidence?

2 MR. PASCARELLA: Yes, your Honor.

3 MR. HANDMAN: My impression was not that at
4 all, your Honor said that was direct evidence but my
5 impression was far from any saying that it was the
6 only or all. I think your Honor simply said that the
7 testimony of John Osborne was direct evidence.

8 MR. PASCARELLA: NO, your Honor, my recollection
9 of the testimony was that after you stated that, and
10 I wrote it down, your Honor just said it after you
11 stated we had direct evidence and circumstantial
12 evidence, you said that the direct evidence was John
13 Osborne's testimony and then you recited -- your
14 Honor , we can have it checked through the minutes.

15 I don't expect Mr. Handman to agree with my
16 statement, but perhaps if we can have it checked
17 through the minutes --

18 THE COURT: Yes, I will have Mr. Karr check
19 it through.

20 (At this point Mr. Karr then read the
21 indicated portion of his Honor's charge.)

22 MR. PASCARELLA: Your Honor, in fact the
23 admission of the defendant himself may very well be
24 considered direct evidence also, but at least we have
25 the conversations in the apartment on the 23rd.

1 THE COURT: All right, all right.

2 MR. PASCARELLA: And the two agents testified
3 to that as well.

4 THE COURT: What else is there?

5 (continued on the next page.)
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1 PASCARELLA: I take it that your Honor has
2 reviewed my request number one and you will not charge
3 that?

4 THE COURT: I feel we are getting into the ques-
5 tion of -- it seems to me we are making the whole jury
6 process much more complicated and, as you know, the
7 Second Circuit has abandoned this whole idea of if
8 the inferences to be drawn are equally consistent with
9 innocence as well as guilt, then the jury must find
10 him innocent. This gets into that subject and may
11 create error the other way.

12 MR. PASCARELLA: Also the Government would
13 request that its request number two be given to the
14 jury.

15 THE COURT: All right.

16 MR. PASCARELLA: We do not have to show --

17 THE COURT: Do not elaborate.

18 MR. PASCARELLA: I am sorry.

19 THE COURT: I will give that. I think I have
20 covered your aiding and abetting.

21 MR. PASCARELLA: We request number eight as the
22 next one that I have noted, your Honor.

23 THE COURT: I will give it to you, but personally
24 I think the charge in conspiracy is always so compli-
25 cated that if anything can be done to keep it simple,

1 2 is in the interest of understanding.

2 MR. PASCARELLA: The important part that I am
3 interested in is the fact that the act of a co-conspira-
4 tor binds the others --

5 THE COURT: Just that last sentence?

6 MR. PASCARELLA: Well, I would request the whole
7 instructions, but particularly a last sentence.

8 THE COURT: All right.

9 MR. PASCARELLA: I believe you did state some-
10 thing to the effect that participation in the conspiracy
11 can be inferred from the facts and circumstances.

12 THE COURT: Yes, I think so.

13 MR. PASCARELLA: Request No. 10 on page 13,
14 especially the first paragraph.

15 THE COURT: Well, I think I covered the second
16 paragraph actually.

17 MR. PASCARELLA: Yes, the second paragraph but
18 the first is what I am concerned with at this point,
19 your Honor.

20 THE COURT: All right.

21 MR. PASCARELLA: The only reason I put in
22 request number 12 was because of the statement by
23 Mr. Handman in his opening -- I think it is on page 27.
24 I have the minutes. He seemed to relegate oral testi-
25 mony as to status well below something that is physical

1 or tangible evidence. I present this to your Honor
2 for consideration.

3 THE COURT: Where did that come from?

4 Where did that charge come from?

5 MR. PASCARELLA: This was a charge that I have
6 put together. It is basically put together on the
7 fact that on page 27 in the opening of Mr. Handman
8 he said: "In other words, you are being asked to
9 believe simple oral testimony, statements, words, or
10 is there something concrete -- factual, unchangeable,
11 that will help you to find either guilt or innocence?"

12 He is indicating that simple oral testimony --
13 words may not be concrete or factual.

14 I had objected, I think, at the time of his
15 remarks.

16 THE COURT: I spent a lot of time pointing out
17 that knowledge or intent may be inferred from acts and
18 so forth.

19 MR. PASCARELLA: I will not press the issue
20 further. I just wanted to bring it to the Court's
21 attention.

22 THE COURT: I am not sure that that would not
23 be confusing.

24 MR. PASCARELLA: Finally, request No. 14.

25 THE COURT: All right.

1 Mr. Handman?

2 MR. HANDMAN: First, with respect to the first
3 request of Mr. Pascarella about the fact that there is
4 other -- that the Government claims that there is other
5 direct evidence aside from Osborne's testimony. I
6 think that by singling it out now at this point after
7 the main body of the charge is concluded, would serve
8 to unduly emphasize in the jury's mind any such other
9 portion of the Government's case that your Honor may
10 specifically refer to and I would think that it would
11 therefore be highly prejudicial to the defendant.

12 THE COURT: I do not want to leave them in a
13 state of confusion about direct evidence. If I can
14 phrase it in some way -- some neutral way, I will.

15 MR. HANDMAN: May I suggest if your Honor does
16 give the charge, something to the effect that any
17 direct evidence, whether it came from Osborne or --
18 well, perhaps I had better reframe.

19 MR. PASCARELLA: May I make a comment?

20 In approaching this subject of direct evidence,
21 the Government's contention is that it sustained its
22 burden by showing direct or indirect and circumstantial
23 evidence. Perhaps that could reviewed again, indicat-
24 ing that the direct evidence would be -- would consist
25 of Osborne's testimony and statements attributed --

1 rather Rodriguez' testimony and statements -- I am
2 sorry, Osborne's testimony and statements attributed
3 to Rodriguez by the agents who testified that they
4 spoke with him directly and he made statements with
5 regard to sale or price.

6 MR. HANDMAN: Now, the jury will be under the
7 impression that the only direct testimony is Osborne's
8 testimony.

9 THE COURT: I will try to cure it in some way.

10 MR. HANDMAN: I just wanted to call that to your
11 Honor's attention, but I had a few other points.

12 With respect to Government's request to charge
13 No. 8, I think that would have to be predicated and
14 emphasized that they first must find that the defendant
15 would be a member of the conspiracy before they could
16 hold him responsible for the other members. That
17 was the Government's request which you agreed to.

18 THE COURT: You say that I didn't cover this
19 part of it: "Once you are satisfied beyond a reasonable
20 doubt that a conspiracy existed, et cetera;" I was
21 sure that I read that.

22 MR. PASCARELLA: I don't recall it.

23 THE COURT: In view of my certainty that I did
24 read that, it would really be duplicating No. 8.

25 MR. PASCARELLA: Yes.

1 THE COURT: I think I shall scratch No. 8 now
2 that I look back and see what I have written out here.

3 MR. HANDMAN: With regard to No. 10 of the
4 Government's request, which your Honor agreed to give,
5 I would merely ask that if your Honor does do paragraph
6 one of part 10 that you also give them paragraph two
7 of part 10.

8 MR. PASCARELLA: I think that has already been
9 given, your Honor. That is at page 13.

10 MR. HANDMAN: Yes, but by regiving the first
11 part of part 10 you are bringing the whole subject up
12 for renewed consideration.

13 MR. PASCARELLA: I think by the Court giving that
14 charge, it is not the regiving of the charge, but giving
15 it for the first time.

16 MR. HANDMAN: It is your own request to charge
17 and I do not think you can split it in half.

18 MR. PASCARELLA: I do not understand Mr. Handman's
19 reasoning. If part of the charge were given and not
20 the whole thing, it is reasonable request.

21 THE COURT: What I had given was not as complete
22 as what you have. I gave them the mere association
23 part.

24 MR. HANDMAN: I know that you did. I am simply
25 saying that if you do give the first part of that

1 request number ten, then you should also give the
2 second.

3 THE COURT: I will tell them again that if they
4 find that a conspiracy did in fact exist -- if they
5 find beyond a reasonable doubt, then the guilt of the
6 conspirators is not measured by the extent or duration.

7 MR. HANDMAN: My request is that you also give
8 them something to the effect that the mere association
9 or friendship does not --

10 THE COURT: Very well. What else?

11 MR. HANDMAN: Then just two other comments that
12 your Honor's reading of the specifics of the law to
13 them does not indicate any disposition on the part of
14 your Honor that they will find either a guilty or
15 innocent verdict or does not indicate any feeling on
16 behalf of your Honor that they will be getting into the
17 law.

18 THE COURT: Just a moment.

19 MR. HANDMAN: What I mean to convey is that the
20 reading of the statutes and the clarification of the
21 offenses therein contained should not be taken as an
22 expression of your Honor's feeling in any way of guilt
23 or innocence.

24 One last factor that the number of witnesses
25 is not the crucial factor in their consideration, but

1 rather the quality of the testimony.

2 THE COURT: Say that again?

3 MR. HANDMAN: That it is not the mere number of
4 witnesses that determine their believability, but the
5 quality of the testimony.

6 THE COURT: Do you have that one written out?

7 MR. HANDMAN: I do not -- I am sorry, I do not
8 have it. I heard it charged to the effect that the
9 jury is not to consider the number of witnesses tes-
10 tifying on any particular point, but to independently
11 assess the credibility of each witness.

12 MR. PASCARELLA: I think your Honor has indicated
13 that they are to look towards the credibility of each
14 witness.

15 THE COURT: I thought I made that perfectly
16 clear. I will try to think of some way to get that
17 point over.

18 I cannot keep this too long. Time is running
19 out.

20 MR. PASCARELLA: It is two, 10, 14 and the
21 direct evidence; is that correct?

22 THE COURT: Yes.

23 (Jury present.)

24 THE COURT: Members of the jury, counsel have
25 called my attention to a number of matters which I will

1 give you now as a supplement to my prior instructions.

2 My attention has been called to the fact that in
3 explaining to you what the Government's position was
4 with respect to sustaining its burden by both direct
5 and circumstantial evidence, I may have inadvertantly
6 given you the impression that the only direct evidence
7 in the case was the testimony of John William Osborne.
8 I am sure your own recollection of the evidence will
9 recall to your mind other instances where conversations
10 were had between witnesses who appeared here and the
11 defendant on trial and it is up to you to determine
12 whether that too would meet the standards I explained
13 to you with regard to what direct evidence is, what
14 one says, hears, senses as distinguished from what one
15 infers by drawing an inference from other facts.

16 Do you understand?

17 Now, I have been asked to instruct you that the
18 requirement of proof beyond a reasonable doubt operates
19 on the whole case and not on separate bits of evidence.
20 Each individual item need not be proven beyond a
21 reasonable doubt, but each essential element of a
22 particular count must be proved beyond a reasonable doubt.

23 Do you understand?

24 Now, in respect of my instructions on conspiracy
25 I would like to say this: The guilt of a conspirator

1 is not measured by the extent or duration of his par-
2 ticipation in the conspiracy, even if he entered into
3 the conspiracy after it was formed or if he participated
4 in it to a degree more limited than that of his co-
5 conspirators, he is equally culpable as long as he was
6 in fact a conspirator.

7 This of course is premised upon my other instruc-
8 tions that you do not even approach the guilt of a
9 particular conspirator or the question of the guilt of
10 a particular conspirator unless you first find that
11 a conspiracy did in fact exist. Do you recall that?

12 I also wish to point out again that mere
13 association with one or more conspirators does not make
14 one a member of the conspiracy. What is necessary is
15 that the defendant participate with knowledge of at
16 least some of the purposes of the conspiracy and with
17 intent to aid in the accomplishment of those unlawful
18 ends.

19 Finally, I wish to point out the Government is
20 not required to prove the essential elements of any
21 of the offenses I defined in these instructions by any
22 particular number of witnesses. The testimony of a
23 single witness may be sufficient to convince you beyond
24 a reasonable doubt of the existence of an essential
25 element of the offense charged, if you believe beyond

1 a reasonable doubt that the witness is telling the
2 truth. However, I caution you again that it is not
3 mere numbers of witnesses that counts for one side or
4 the other, but the quality of the evidence as a whole.

5 Do you understand that?

6 Now, also, in reading to you what the various
7 provisions of the criminal statutes were, I of course
8 did not intend and I am assuming that you did not
9 receive that reading as any expression of any views
10 I had as to guilt or innocence in this case, because
11 I assure you now it is not my duty to have any and I
12 have none. So with that I will now permit you to
13 retire and begin your deliberations.

14 Juror No. 1 will be your foreman. Any messages
15 that you may wish to convey to the Court, please write
16 them out on a pad that will be provided to you and
17 deliver it to the Marshal and I will reconvene counsel
18 to see what response should be made. If you wish any
19 of the exhibits to be sent in during the course of your
20 deliberations, you may ask for them in the same manner.
21 You also have the right if need be to have any portion
22 of the testimony you heard repeated to you. We have
23 the transcript here and it will not be difficult to
24 do so.

25 All right, you may retire.

(Jury leaves courtroom.)

10

THE COURT: Is that satisfactory?

THE FOREMAN: Yes.

THE COURT: Very well, you may return to the jury room to finish your deliberations.

* * *

(7:15 p.m.)

THE CLERK: Juror's note marked Court's Exhibit 4.

THE COURT: I have a note from the jury indicating that they have reached a verdict.

Will the marshal bring them in, please?

(Jury present)

THE COURT: Members of the jury, I have your note advising the Court that you have reached a verdict. I am therefore going to ask the Clerk to inquire as to what that verdict is.

THE CLERK: Madame foreman, in the matter of United States of America against Osmundo Rodriguez, how do you find the defendant, Osmundo Rodriguez, as to count one, guilty or not guilty?

THE FOREMAN: We find the defendant guilty on count one.

THE CLERK: How do you find the defendant as to count two, guilty or not guilty?

THE FOREMAN: We find the defendant guilty

1 11 on count two.

2 THE CLERK: How do you find the defendant on
3 count three, guilty or not guilty?

4 THE FOREMAN: We find him guilty on count three.

5 THE CLERK: And so say you all.

6 THE COURT: Do you wish to have the jury
7 polled?

8 MR. HANDMAN: Yes.

9 THE CLERK: Juror number one, is that your
10 verdict?

11 THE COURT: You need not rise.

12 JUROR NUMBER ONE: Yes.

13 THE CLERK: Juror number two, is that your
14 verdict?

15 JUROR NUMBER TWO: Yes.

16 THE CLERK: Juror number three, is that your
17 verdict?

18 JUROR NUMBER THREE: Yes.

19 THE CLERK: Juror number four, is that your
20 verdict?

21 JUROR NUMBER FOUR: Yes.

22 THE CLERK: Juror number five, is that your
23 verdict?

24 JUROR NUMBER FIVE: Yes.

25 THE CLERK: Juror number six, is that your
verdict?

JUROR NUMBER SIX: Yes.

THE CLERK: Juror number seven, is that your verdict?

JUROR NUMBER SEVEN: Yes.

THE CLERK: Juror number eight, is that your verdict?

JUROR NUMBER EIGHT: Yes.

THE CLERK: Juror number nine, is that your verdict?

JUROR NUMBER NINE: Yes.

THE CLERK: Juror number ten, is that your verdict?

JUROR NUMBER TEN: Yes.

THE CLERK: Juror number eleven, is that your verdict?

JUROR NUMBER ELEVEN: Yes.

THE CLERK: Juror number twelve, is that your verdict?

JUROR NUMBER TWELVE: Yes.

THE COURT: Well, members of the jury, I say again that you played a very important and indeed active role with the Court in the administration of justice under our system of law. I observed you during the trial and could not help but notice how patiently and intelligently you listened to the

1 13 evidence and your questions for the re-reading of
2 testimony indicated careful attention to the issues
3 of the case. I therefore wish to express my deep
4 thanks on behalf of myself personally and the Court
5 as a whole for the part you played here today and
6 therefore I excuse you with my best wishes.

7 (Jury leaves courtroom)

8 (continued on following page)
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STATE OF NEW YORK)
: SS:
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 12 day of July, 1974 deponent served the within *Appendix* upon *Attorney*

attorney(s) for *Appellee*

in this action, at *225 Cadman Plaza East*
Brooklyn, NY

the address designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.


ROBERT BAILEY

Sworn to before me, this
12 day of *July, 1974*

William Bailey
WILLIAM BAILEY

Notary Public, State of New York

No. 43-0132945

Qualified in Richmond County

Commission Expires March 30, 1976